A

COSMOPOLITAN AVENUE SDN BHD v. KHONG YAO HAN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
AZIMAH OMAR JCA
B COLLIN LAWRENCE SEQUERAH JCA
[CIVIL APPEAL NOS: B-02(IM)(NCvC)-1594-08-2022
& B-02(IM)(NCvC)-1654-09-2022]
23 AUGUST 2024

C

Abstract – *(i) An architect, acting as an independent professional and not a party to a sale and purchase agreement ('SPA'), cannot be held liable for negligence or unlawful interference if they issue a partial certificate of completion ('CCC'), in compliance with the terms of the SPA, even if the CCC does not meet the requirements for a full CCC;*
D *(ii) A contract must be read as a whole and no one term ought to be read in isolation from the other prevailing terms of a contract. When a contract is unambiguous, with clear terms and subject matter, it does not leave any room for 'innovative' or 'creative' interpretation.*

E

CONTRACT: *Agreement – Sale and purchase agreement – Privity – Claim by purchasers against developer and architect – Vacant possession of parcels delivered by developer without valid full certificate of completion and compliance ('CCC') – Signatories to sale and purchase agreements ('SPAs') only purchasers and developer – Purchasers claimed against architect for negligence and/or unlawful interference*
F *for issuing partial CCC instead of full CCC – Whether purchasers had established prima facie case of negligence and/or unlawful interference against architect – Whether architect privy to SPAs*

CONTRACT: *Agreement – Sale and purchase agreement – Terms – Claim by purchasers against developer and architect – Vacant possession of parcels delivered*
G *by developer without valid full certificate of completion and compliance ('CCC') – Terms of sale and purchaser agreements – Whether clear and unambiguous – Rule of interpretation*

LAND LAW: *Vacant possession – Liquidated ascertained damages – Claim for – Claim by purchasers against developer – Vacant possession of parcels delivered by*
H *developer without valid full certificate of completion and compliance – Terms of sale and purchaser agreements ('SPAs') – Whether clear and unambiguous – Whether there were triable issues as to interpretation of SPAs and propriety of delivery of vacant possession by developer*

I

CIVIL PROCEDURE: *Striking out – Appeal – Claim by purchasers against developer and architect – Vacant possession of parcels delivered by developer without valid full certificate of completion and compliance – Application by developer and architect to strike out claim – Whether there were triable issues warranting trial – Whether claim ought to be struck out – Rules of Court 2012, O. 18 r. 19*

Cosmopolitan Avenue Sdn Bhd ('CASB'), a developer and vendor, had appointed Ar Loo Change Seng ('architect') as the architect for a mixed commercial development ('project'). The respondents ('plaintiffs') were the purchasers of office units in the project. The only two signatories to all of the sale and purchase agreements ('SPAs') were the respective purchasers and CASB; the architect was not at all privy to the SPAs. Upon the completion of the purchasers' respective parcels of office units, the architect issued a partial certificate of completion and compliance ('CCC'). The plaintiffs commenced a suit at the High Court against: (i) CASB on the grounds that the vacant possession of the plaintiffs' parcels delivered by the said developer to them was without a valid full CCC of the entire project (in Form F) and hence, the plaintiffs were entitled to additional liquidated ascertained damages ('LAD'); and (ii) the architect for negligence and for causing unlawful interference in negligently issuing a partial CCC in Form F, instead of a full CCC in Form F. CASB and the architect applied to strike out the plaintiffs' claim. The Judicial Commissioner ('JC') dismissed the striking out applications by CASB and the architect on the grounds that the case was not a plain and obviously unsustainable case which could be summarily struck out. Hence, the present appeals by CASB and the architect. The issues that arose in these appeals were whether the JC was correct in finding that: (i) the plaintiffs had established a *prima facie* case of negligence and/or unlawful interference against the architect for issuing a partial CCC in Form F1, instead of a full CCC in Form F; and (ii) there were triable issues as to the interpretation of the SPAs and as to the propriety of the delivery of vacant possession by CASB based on the partial CCC in Form F1.

Held (allowing appeals)
Per Azimah Omar JCA delivering the judgment of the court:

(1) The error in the JC's analysis was jarring considering that the JC had ascribed to the misconception that the architect's professional duty to certify the said project's work progress was equal to or the same with the alleged contractual duty of CASB to obtain a CCC, either partial or full, to enable the said developer to deliver vacant possession within the time limit set under the SPAs. Whether or not Form F1 (partial CCC/CFO) issued by the architect was in conformity with the terms of the SPAs for the developer's duty to deliver vacant possession was not at all relevant to or privy against the architect. The plaintiffs could not enforce whatever contractual period for delivery of vacant possession under the SPAs against the architect, as an independent architect, who was not

even a signatory or even party to the SPAs. It was not at all the architect's duty to ensure whether Form F1 or even Form F was the appropriate CCC for a valid delivery of vacant possession under the SPAs. Whether the delivery of vacant possession was valid or not was a matter totally privy between the plaintiffs and CASB. To extend the developer's duty over to the architect was plainly against public policy and would impede the partial and professional duty of an architect to certify the work progress in compliance with the relevant laws and by-laws. The plaintiffs also attempted to disguise their contractual claim for LAD as a tortious claim for negligence on the false pretense that somehow, the architect's standard and/or duty of care owed as against the purchasers, even extended to ensure that the purchasers would obtain vacant possession within the time stipulated under the SPAs. The JC was certainly wrong to find that the plaintiffs had established a *prima facie* case of negligence and/or unlawful interference against the architect. The architect's striking out application should have been allowed. (paras 27, 28, 36 & 47)

(2) The SPAs, in clear and unequivocal terms, prescribed the partial CCC in Form F1 (for the completion of specific 'parcels') as the contractual threshold in which the developer may deliver the vacant possession. It is a trite rule of interpretation that a contract must be read as a whole and no one term ought to be read in isolation from the other prevailing terms of a contract. Thus, the manner of delivery of the vacant possession, under cl. 25.1 of the SPAs, must necessarily be read together with the definitions as per cl. 1.1 of the SPAs. It was clear and vivid that the subject matter that was contractually agreed under cl. 25(1) of the SPAs to be delivered vacant possession was the 'parcel' and not the project. Since the word used was 'parcel', the plaintiffs could not simply ascribe their own assumptions so as to the meaning of the word 'parcel'. This was not a case where the contract was vague, which would have necessitated a deeper investigation as to the extraneous facts surrounding the contract. The specificity of the subject matter and the terms of the SPAs did not at all leave any room for 'innovative' or 'creative' interpretation as insisted by the plaintiffs. If the parties had intended that the individual parcels could only be delivered vacant possession together with all other phases and full features of the completed project, then the SPAs must necessarily reflect as such, which, in this case, all the SPAs certainly did not reflect so. Any insistence of this contention would only serve to unlawfully and unjustly rewrite the terms of the SPAs which the court should never condone. The JC erred in finding that there were triable issues necessitating a trial. (paras 50-52, 54 & 61)

(3) Further negating the plaintiffs' claim beyond salvation was the fact that a large majority of the purchasers had already entered into full and final settlement agreements in which they were already paid LAD, upon which they agreed to no longer have any claims against the developer under the SPAs. Considering the settlement agreements, the plaintiffs had already put the matter of LAD to final rest and conclusion. It would only be gravely unjust to allow the plaintiffs to relitigate the same exact matter that the plaintiffs had unequivocally laid to rest. (paras 61 & 62)

(4) The High Court's decision to dismiss both CASB's and the architect's striking out applications was set aside. The applications were allowed and the entirety of the plaintiffs' claims against CASB and the architect was struck out. (para 67)

Case(s) referred to:

Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors [2022] 4 CLJ 716 HC ***(refd)***

Chua Chong Poh & Ors v. Kingsley Hills Sdn Bhd & Anor [2020] CLJU 1110; [2020] 1 LNS 1110 HC ***(refd)***

Cosmopolitan Avenue Sdn Bhd v. Thien Kim Keong & Ors And Another Case [2021] CLJU 664; [2021] 1 LNS 664 HC ***(refd)***

Loh Chiak Eong & Anor v. Lok Kok Beng & Ors [2012] 9 CLJ 699 CA ***(refd)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Quah Eng Hai & Anor v. Cosmopolitan Avenue Sdn Bhd & Ors [2019] 8 MLJ 194 ***(refd)***

Tham Wai Keat & Ors v. Cosmopolitan Avenue Sdn Bhd & Anor [2023] MLJU 1007 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19

For the appellants - Alvin Lai Kok Wing & Cheryl Leong Kit Yee; M/s Justin Voon Chooi & Wing

Syed Fadzil Hashim Alhabshi & Aimee Lee Kim Moong; M/s Sidek Teoh Wong & Dennis

For the respondents - Ranjan N Chandran & Vinitha Laksmy Mohan; M/s Hakem Arabi Assocs

[Editor's note: For the High Court judgment, please see Khong Yao Han & Ors v. Cosmopolitan Avenue Sdn Bhd & Anor [2021] CLJU 2731; [2021] 1 LNS 2731 (overruled).]

Reported by Najib Tamby

JUDGMENT

Azimah Omar JCA:

Introduction

[1] There were two appeals before us, namely; (i) B-02(IM)(NCvC)-1594-08-2022 ("Appeal 1594/developer's appeal") and (ii) B-02(IM)(NCvC)-1654-09-2022 ("Appeal 1654/architect's appeal"). Both appeals originated from the same High Court Suit No. BA-22NCvC-89-02-2021 ("HC Suit 89").

[2] HC Suit 89 is essentially the respondents-plaintiffs' claim against the developer for 'additional' liquidated ascertained damages ("LAD") mounted on the allegation that the vacant possession delivered by the appellant-defendant developer (on the basis of a partial certificate of completion and compliance (also known as "Form F1/partial CCC/partial certificate of fitness for occupation/partial CFO") of the plaintiffs' specific parcels) was either a meaningless or an invalid delivery of vacant possession. Thus, the plaintiffs contended that the delay for delivery of vacant possession subsisted even after the developer's invalid delivery of vacant possession.

[3] A majority of the respondents-plaintiffs had already been paid LAD by the appellant-developer upon the parties' mutual execution and entry into full and final settlement agreements.

[4] However, the plaintiffs somehow roped in the architect for the developer's alleged additional delay and wrongful delivery of vacant possession despite the fact that the architect was neither privy to the SPAs nor was contractually obliged to ensure that the plaintiffs' respective parcels were delivered within the deadlines set under the SPAs.

[5] Appeal 1594 or the developer's appeal is the appeal by the first defendant-developer, Cosmopolitan Avenue Sdn Bhd ("the developer/CASB") against the learned Judicial Commissioner's ("learned JC") decision to dismiss the CASB's application to strike out the plaintiffs' claim against the developer pursuant to O. 18 r. 19 of the Rules of Court 2012 (O. 18 r. 19 of the ROC 2012).

[6] While Appeal 1654 or the architect's appeal, is the appeal by the second defendant, Loo Chang Seng ("the architect") whose application under O. 18 r. 19 of the ROC 2012 to strike out the plaintiffs' claim against him was similarly dismissed by the same learned JC.

[7] In any case, it is only apt that we appreciate the underlying facts of this appeal before we delve into the grounds of our judgment and error in the learned JC's decision to dismiss both the developer's and architect's striking out applications.

Facts Of The Case

[8] The respondents-plaintiffs are purchasers of office units in the mixed commercial development project known as 'Empire City, Damansara' ("the project") erected on HS(D) 222400, No. PT 44016 and HS(D) 222402, No. P.T. 44017, both in Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor.

[9] The only two signatories to all of the sale and purchase agreements ("SPAs") were the respective purchasers and CASB as the developer. The architect was not at all privy to the SPAs.

[10] The project consists of, amongst others, shopping mall, office building blocks and studio building blocks.

[11] CASB is the developer and vendor of the project as well as the registered owner of all those pieces of land held under HS(D) 222400, No PT 44016 and HS(D) 222401, No. PT 44017, both in Mukim Sungai Buloh, Daerah Petaling, Negeri Selangor.

[12] The second defendant is a licensed architect appointed by CASB for the project, practising under the name and style of 'EDA architects'.

[13] CASB had obtained the approval of the building plans from the appropriate authority on 23 March 2012.

[14] CASB, as the vendor, had agreed to sell and the plaintiffs, as the purchasers, had agreed to purchase units in Blocks E (office suites) and M (SOHO office) of the project with vacant possession subject to the terms and conditions contained in the SPAs.

[15] The salient terms under the SPAs governing the completion and delivery of the purchasers' respective parcels (or partial/practical completion of the project) are cl. 25.1, cl. 25.2, cl. 1.1 (o), cl. 1.1 (m), and the Sixth Schedule to the SPAs:

> 25.1 Upon the **issuance of a certificate by the Vendor's architect certifying that the construction of the parcel has been practically completed** in accordance thereof and provided the Purchaser having paid all monies payable under Clause 4 in accordance with the THIRD SCHEDULE hereto and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on this part under this Agreement the **Vendor shall let the Purchaser into possession of the Parcel.**
>
> 25.2 Such possession shall not give the Purchaser the right to occupy the Parcel and the Purchaser shall not occupy the Parcel until such time as the Certificate of Completion and Compliance of the Parcel is issued.
>
> (emphasis added)

[16] To be absolutely accurate and precise with what vacant possession ("VP") that was contractually mandated to be delivered, it is pertinent to appreciate the true definition and distinction between a 'parcel' and the 'project'.

> (m) **"Parcel"** means **ONE of the unit situated in the Units and more particularly described in Part II of the SIXTH SCHEDULE hereto.**
>
> …
>
> (o) **"Project"** means the proposed integrated commercial and/or residential development…known as EMPIRE CITY @ DAMANSARA (emphasis added)

[17] Upon the completion of the purchasers' respective parcels of office units, the architect had rightfully issued a partial CCC in Form F1 for parcels in Block E on 18 January 2016, and for parcels in Block M on 11 August 2016.

[18] In the HC Suit 89, which was commenced by the plaintiffs *via* a representative action (wherein they are both acting in their personal capacities and on behalf of all 58 purchasers), the plaintiffs sought, *inter alia*, for a declaration that:

(i) as against the developer:

The VP of the plaintiffs' parcels delivered by the developer to them was without a valid full CCC of the entire project (in Form F) and hence the plaintiffs are entitled to additional LAD calculated up until the date of filing of the claim (25 February 2021).

(ii) as against the architect:

The architect was negligent and had caused unlawful interference in negligently issuing a partial CCC in Form F1 instead of a full CCC in Form F.

[19] We are minded that the parties' reference to the partial CCC in Form F1 was also interchangeably referred to as a certificate of practical completion ("CPC"). For the sake of uniformity and consistency, we shall refer to Form F1 or the CPC as "partial CCC".

[20] It is to be noted that the 37th plaintiff (Roshan Menon) and the 50th plaintiff (Law Seong Heng) had filed their notice of discontinuance, discontinuing their action against the defendant on 20 April 2022.

[21] The developer's and the architect's applications to strike out the plaintiffs' claim were in encls. 12 and encl. 14, respectively. The striking out applications in encls. 12 and 14 primarily were grounded on the following grounds:

(i) the contractually agreed threshold for delivery of VP under cl. 25.1 and 25.3 of the SPAs was only a *partial CCC of the specific parcel and not full CCC of the entire project;*

(ii) the developer's delivery of VP *via* the issuance of the notice of delivery of vacant possession ("VP notice") premised upon the architect's partial CCC in Form F1, was a valid delivery of VP under the SPAs and the prevailing laws;

(iii) thus, the plaintiffs are not entitled to assume that the delay in delivery of VP subsisted beyond the VP notice so as to wrongfully entitle them to additional LAD beyond what was contractually agreed upon;

(iv) moreover, before the plaintiffs commenced legal suit herein, majority of the plaintiffs had already entered into settlement agreements with the developer to accept LAD sums as full and final settlement of the LAD claims;

(v) therefore, the plaintiffs should be estopped from filing this suit to claim for the LAD sum, which was more than the settlement sum previously agreed upon by both parties;

(vi) the architect was not negligent in issuing the partial CCC in Form F1 instead of the full CCC in Form F. The plaintiffs have unjustly placed an unlawful duty and standard of care against the architect; and

(vii) the architect was not even privy to the SPAs, which was the plaintiffs' basis for their claim for LAD against the developer.

Findings Of The High Court

[22] The learned JC had dismissed both the striking out applications filed by the developer and the architect (encls. 12 and 14) essentially on the grounds that the case was somehow not a plain and obviously unsustainable case which can be summarily struck out by the court.

[23] Perplexingly, the learned JC decided so based on two contradicting findings. On one hand, the learned JC was of the view that the prevailing issue within the case was a matter of contrasting contractual interpretation of cls. 24 and 25 of the SPAs. On the other hand, the learned JC was also of the view that a mere issue of contractual interpretation was somehow a triable issue and cannot be summarily determined *via* affidavit evidence. The contradiction between these two findings was that, if indeed that there was an issue as to interpretation of contract, then the question of interpretation was a question of law (rather than fact) which do not require *viva voce* evidence. If it was a matter of contractual interpretation, then the case can be determined in a summary manner by having the parties submit on what they supposed to be the correct reading of the SPAs.

[24] Against trite and well-established laws, the learned JC somehow found that there was a triable issue on whether or not the architect owed a duty of care to the purchasers and had been negligent in issuing a partial CCC in Form F1 instead of a full CCC in Form F.

[25] Even more perplexing, the learned JC seems to believe that the purchasers had *prima facie* claim against the architect for unlawful interference for 'inducing' the developer to deliver VP based off of the partial CCC in Form F1, despite the fact that the architect was not even contractually privy to the SPAs themselves.

A

The Appeals Before Us

[26] We have perused both the developer's and architect's memorandums of appeal, records of appeal, and the parties' respective written submissions and we are of the mind that the appeal before us can be appropriately be disposed of by determining the following issues:

B

(i) first issue: whether or not the learned JC was correct to find that the plaintiffs had established a *prima facie* case of negligence and/or unlawful interference against the architect for issuing a partial CCC in Form F1 instead of a full CCC in Form F; and

C (ii) second issue: whether or not the learned JC was correct to find that there were triable issues as to the interpretation of the SPAs and as to the propriety of the delivery of VP by the developer based on the partial CCC in Form F1.

D

First Issue: Whether Or Not The Learned JC Was Correct To Find That The Plaintiffs Had Established A *Prima Facie* Case Of Negligence And/Or Unlawful Interference Against The Architect For Issuing A Partial CCC In Form F1 Instead Of A Full CCC In Form F

[27] The error in the learned JC's analysis was jarring considering the learned JC had ascribed to the misconception that the architect's professional duty to certify the said project's work progress was equal to or the same with the alleged contractual duty of the developer to obtain a CCC (either partial CCC or full CCC) to enable the developer to deliver VP within the time limit set under the SPAs. This misconception is plainly wrong simply because:

E

F (i) an architect's duty to certify under statute law developer's contractual duty to obtain CCC for delivery of VP within time: Whether or not Form F1 (partial CCC/CFO) issued by the architect was in conformity with the terms of the SPAs for the developer's duty to deliver VP is not at all relevant to or privy against the architect; and

G (ii) the plaintiffs cannot enforce whatever contractual period for delivery of VP under the SPAs against the architect (as independent architect) who is not even a signatory or even party to the SPAs.

[28] The plaintiffs also attempted to disguise their contractual claim for LAD, as a tortious claim for negligence on the false pretense that somehow, H the architect's standard and/or duty of care owed as against the purchasers, even extend to ensure that the purchasers will obtain VP within the time stipulated under the SPAs.

[29] There is no necessity for a lengthy deliberation to debunk the plaintiffs' ill-conceived placement of the wrong standard and/or duty of care I against the architect as an independent architect. The Federal Court in the

landmark case of *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008; [2015] 4 MLJ 734 has in finality, penned down the Malaysian position on an architect's scope of duties that it does not include any duty of care to ensure that the building is certified so as to enable delivery of VP within the SPA's contractual period:

> It was an undisputable fact that *the construction of the CIETs was not the responsibility of the respondents but the developer.* As such, the *respondents need not assume responsibility for the delay involved in obtaining the approval for CFO when the CIETs were not functioning* in accordance with the requirements set out by the DOE, as *this was not within the scope of the respondents' professional work.* (emphasis added)

[30] The principle and facts of *Lok Kok Beng* above applies *mutatis mutandis* to the present case. In *Lok Kok Beng*, 50 purchasers have mounted claims for damages (for delay in delivery of VP). The 50 purchasers similarly roped in the respondent-architect for the alleged failure and delay to issue the requisite CFO within the contractual period that the developer was supposed to deliver VP. This is squarely in *pari materia* to the plaintiffs' case here in wrongfully blaming the architect's alleged failure to issue Form F (full CCC/CFO) to enable the developer to deliver VP within time. In this regard, the Federal Court in clear terms upheld that it would be against public policy and even safety of the building to insist and coerce an architect to issue whatever certification just so that VP can be delivered within the developer's contractual period:

> *Further, it would be against public policy to impose on architects a duty to deliver vacant possession of buildings within the developer's contractual period.* This would only serve to *compromise or to impede their professional duty* in ensuring that the *building laws were observed* and that the structure of the *building was safe.* (emphasis added)

[31] And this is exactly the same narrative adopted by the architect. The plaintiffs cannot and ought not impede on the architect's duty to issue only Form F1 (partial CCC/CFO), which is the appropriate form to certify the full completion of only the phase for Block E and Block M. The plaintiffs also cannot insist or force the architect to issue out Form F (full CCC/CFO) on the alleged pretense of enabling a valid delivery of VP under the SPAs.

[32] In fact, the forced issuance of Form F (full CCC/CFO) would directly mean a transgression against the architect's statutory and professional duty as an architect. The Federal Court in clear terms has answered and decided that an architect does not owe such duty of care and that an action for delay of delivery of VP can only be mounted against the developer alone:

A [32] … In this connection, *the appellant's claims do not fall within the scope of work of the respondents. The appellants also failed to establish proximity of relationship between the parties to give rise to a duty of care.* In view of the terms of the contract ('the SPAs') between the appellants and the developerand the specific remedy provided therein, *the appellant's claims must fail.*

B (3) *whether the purchasers' only remedy in law is to sue the developer?*

The answer is in the positive. (emphasis added)

[33] The Federal Court also fully adopted the Court of Appeal's decision in *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2012] 9 CLJ 699; [2013] 1 MLJ 27 that an architect does not owe any duty of care to ensure that a C CFO be obtained without undue delay under the SPAs between the developer and purchasers:

While an architect may be made liable for faulty design or negligent supervision resulting in personal injury or inherent defects or damage to property, *there is no authority to support the contention* made in the present case D that the appellants, *as the architects, owed the respondents, as purchasers of the industrial buildings, a duty of care to ensure that the cfos were obtained without undue delay.* (emphasis added)

[34] The Court of Appeal even went as far as finding that the purchasers cannot simply disguise their claim for delays under the SPAs by alleging E negligence against the architect:

Therefore, *should there be any undue delay in obtaining the CFO*, the plaintiffs'/purchasers' only remedy, in our view, is to sue the developer for breach of contract or for negligence, *and not to sue the defendants/architects, who have no contractual relationship with the plaintiffs/purchasers, by attempting to invoke the* F *law of negligence.* (emphasis added)

[35] The precedents above (inclusive of the Federal Court) have in finality limited the scope of responsibility and duty of an architect to not include the duty to certify/to complete construction/to deliver VP within the developer's or contractor's contractual period. In the gross absence of duty G of care, it is only natural that all other elements to prove negligence shall fail. Since the architect does not owe such duty of care, there can be no breach of duty nor any damages consequent to a breach by the architect.

[36] Succinctly speaking, it is not at all the architect's duty to ensure whether Form F1 or even Form F is the appropriate CCC for a valid delivery H of VP under the SPAs. Whether or not the delivery of VP is valid or not is a matter totally privy only between the plaintiffs and the developer. To extend the developer's duty over to the architect is plainly against public policy and would impede the partial and professional duty of an architect to certify the work progress in compliance with the relevant laws and by-laws.

I **[37]** In any case, the plaintiffs' complaint against the architect was neither regarding the architect's drawings, plans, or even the safety or integrity of the building. Nor was it the plaintiffs' case to dispute the validity of the

architect's issuance of mere Form F1 (partial CCC/CFO) as the plaintiffs also claim that the said project has not been fully completed. Instead, the plaintiffs' dispute was that it was improper for the developer to deliver VP on the basis of Form F1 (which upon all of the scintillating precedents above, is a contractual issue totally irrelevant to the architect).

[38] The Federal Court in *Lok Kok Beng* in clear terms held that firstly, the court must acknowledge and consider the contractual matrix between the developer and purchasers which have clearly codified their respective rights and liabilities. Secondly and most pertinently, any remedy or right specifically under the SPAs cannot be mounted against the architect for absence of privity of contract. Doing so would be tantamount to wrongful rewriting the terms of the SPAs:

> we agree with the Court of Appeal *that the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties* and their relative bargaining positions. *There can be no action against the architect if the remedy asked for is specifically provided for in the contract*. Otherwise, it has the *effect of rewriting the contractual terms.* Such claims must be dismissed on grounds of policy.
>
> (emphasis added)

[39] Similar to the present case, the plaintiffs' claim for LAD for alleged delay in delivering VP is contractual under the SPAs. The plaintiffs' claim for negligence against the architect was also predicated upon the architect's failure to comply with a term under the SPAs, which allegedly only accepts Form F (full CCC/CFO) as valid basis for delivery of VP.

[40] Thus, since all of the plaintiffs' cause of action stems from the terms of the SPAs, then it clearly gleans that the plaintiffs' claim is contractual in nature and is only privy between contracting parties (being the developer and the purchasers).

[41] In fact, the architect's duty of certification is not subject to any contract but instead is subject to the relevant governing laws, by-laws, guidelines and approvals by the local authority. In fact, the Lembaga Arkitek Malaysia ("LAM") *vide* its guideline in General Circular No 2/2010 clearly stipulates that the architect's duty to issue Form F1 is subject to the approval of the relevant local authorities:

> Dengan itu Borang F1 hanya boleh dikeluarkan bagi bahagian/bahagian-bahagian yang telah dijadual *mengikut kebenaran daripada pihak berkuasa tempatan.* Orang utama yang mengemukakan *tidak boleh menggunakan budi bicaranya sendiri untuk mengeluarkan Borang F1.* Borang F akan dikeluarkan bagi keseluruhan bangunan apabila semua bahagian telah siap kelak.
>
> (emphasis added)

[42] And rightfully so, upon the approval of the local authorities in Forms G1 to G21, it was legally incumbent upon the architect to issue Form F1 (partial CCC/CFO). The LAM in General Circular No 2/2010 also endorses and clearly admits that Form F1 (partial CCC/CFO) is a legally valid instrument to be issued in circumstances where specific portions of a project was completed ahead of other remainder portions:

> *Borang F1* bertujuan untuk memenuhi kehendak sebuah bangunan yang memerlukan mana-mana bahagian/bahagianbahagian pembangunan untuk disiapkan mendahului yang lain. *Contohnya ialah sebuah kompleks seperti pusat membelibelah dengan menara kediaman atau komersial di atasnya.* (emphasis added)

[43] In fact, it is plain and vivid that Form F1 is a valid instrument under the governing law of the Undang-Undang Kecil Bangunan Seragam Selangor ("UUKBSS"). By-Law 27(1) of the UUKBSS clearly stipulates that Form F1 is a "Perakuan Kelayakan Menduduki Sebahagian" or a partial CFO/CCC.

[44] Furthermore, By-Law 27(2) of the UUKBSS goes as far as to stipulate that Form F1 must be in effect until the remainder portion of the project is later completed and that any portion already certified with Form F1 is already fit for occupation:

> *Suatu perakuan kelayakan menduduki sebahagian* apabila dikeluarkan *hendaklah berkuatkuasa* berterusan sehingga keseluruhan bangunan itu siap. Tiada seorang pun boleh menduduki atau membenarkan diduduki mana-mana bangunan atau mana-mana bahagiannya *melainkan jika suatu … perakuan kelayakan menduduki sebahagian … telah dikeluarkan di bawah Undang-Undang Kecil ini …* (emphasis added)

[45] Thus, it is patently obvious that the architect's role in the issuance of Form F1 is entirely distinct and separate from the SPAs and is instead governed by clear governing laws and guidelines. Therefore, it is erroneous for the plaintiffs to assume that the architect's role and duty to be one and the same with the developer's contractual duty to deliver VP within the contractual period under the SPAs.

[46] Much guidance can be gleaned from the recent decision in *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors* [2022] 4 CLJ 716; [2022] 10 MLJ 153:

> [37] Therefore, was it wrong for the third defendant to issue a Form F1 instead of Form F. I am of the opinion that the third defendant is entitled to issue a Form F1 in accordance with its duties under the Street, Drainage and Building Act 1974, Selangor Uniform Building By-Laws 1986 ('the UUKBS 1986').
>
> …

> [40] I find that the said defendant has produced the required Forms G1-G21 and all supported documents in exh. SAS3. *I find that the third defendant has shown that the said Form F1 was issued in accordance with statutory provisions and that they had acted lawfully in accordance with their obligations under the relevant statutory provisions. It is not for the plaintiffs to dictate the required form that should be issued by the architect, the third defendant, as that would be contrary to the statute and defeat the purpose of having him to exercise hisduties to ensure that the project is safe and sound for occupation by the intended purchasers.* (emphasis added)

[47] All of the above deliberations considered, we hereby answer the first issue in the negative. The learned JC was certainly wrong to find that the plaintiffs had established a *prima facie* case of negligence and/or unlawful interference against the architect for issuing a partial CCC in Form F1 instead of a full CCC in Form F. And since the plaintiffs-respondents had failed to prove a *prima facie* case, then the learned JC should have allowed the architect's striking out application.

Second Issue: Whether Or Not The Learned JC Was Correct To Find That There Were Triable Issues As To The Interpretation Of The SPAs And As To The Propriety Of The Delivery Of VP By The Developer Based On The Partial CCC In Form F1

[48] Since we have identified the proper privies of the SPAs for a dispute for LAD (being the developer and the purchasers), we shall proceed to determine whether the learned JC's dismissal of the developer's striking out application was proper or otherwise.

[49] In essence, the respondents-plaintiffs are insistent that the entirety of the mixed and phased commercial project must be completed before the developer can appropriately deliver VP to the purchasers. The learned JC was also somehow moved to ponder the plaintiffs' insistence to the extent that the learned JC found that there was a triable issue as to the proper interpretation of the terms of the SPAs (particularly the terms governing the manner and method in which VP shall be delivered).

[50] In the earlier part of this judgment, we have already identified the unambiguous and clear terms under the SPAs which govern the delivery of VP. Contrary to what the learned JC and the plaintiffs, believed and insisted, we are of the view that the SPAs in clear and unequivocal terms prescribes the partial CCC in Form F1 (for the completion of specific "parcels") as the contractual threshold in which the developer may deliver VP.

[51] It is a trite rule of interpretation that a contract must be read as a whole and no one term ought to be read in isolation from the other prevailing terms of a contract. Thus, the manner of delivery of VP under cl. 25.1 of the SPAs must necessarily be read together with the definitions as per cl. 1.1 of the SPAs.

[52] Thus, it was clear and vivid that the subject matter that was contractually agreed under cl. 25.1 of the SPAs to be delivered VP was the "parcel" and not project. Since the word used was "parcel", the plaintiffs cannot simply ascribe their own assumptions so as to the meaning of the word, 'parcel'. This was not a case where the contract was vague which would have necessitated a deeper investigation as to the extraneous facts surrounding the contract. Instead, the word "parcel" had been explicitly defined under cl. 1.1(o) of the SPAs:

> **"Parcel"** means **one of the unit situated in the units and more particularly described in Part II of the sixth schedule hereto.**
>
> (emphasis added)

[53] And Part II of the Sixth Schedule of the SPAs all describes the specific unit that a given purchaser had purchased from the developer. For instance:

PART II	Parcel No.	:	M-03-13
Particulars of the Parcel	Storey No.	:	03
	Type	:	D
	Area of Parcel (excluding accessory parcel)	:	602 sq. ft.
	Area of accessory parcel	:	NIL sq.ft.

[54] The specificity of the subject matter and the terms of the SPAs do not at all leave any room for 'innovative' or 'creative' interpretation as insisted by the plaintiffs. If the parties have intended that the individual parcels can only be delivered VP together with all other phases and full features of the completed project, then the SPAs must necessarily reflect as such (which in this case, all the SPAs certainly do not reflect so). And any insistence of this contention would only serve to unlawfully and unjustly rewrite the terms of the SPAs, which the court should never condone.

[55] In fact, as astutely highlighted by learned counsel for the architect, cl. 20.4 of the SPAs had already mutually anticipated the instance where the individual parcels to be completed ahead of other parts or phases of the project.

> The Purchaser hereby expressly acknowledges and agrees that by reason of the Parcel forming part of the overall development of the Project, *construction and other works shall continue to be carried out on at and to other parts of the project even after the issuance of certificate of completion and compliance to the parcel* … (emphasis added)

[56] This clause in vivid terms effectively entitles the developer to:

(i) deliver VP based on partial CCC in Form F1 for the specific parcels ahead of the completion of the other parts or phases of the project; and

(ii) continue work and construct other parts of phases of the project after the specific parcels were already delivered VP based on partial CCC in Form F1.

[57] Considering the glaring simplicity and clarity of the terms of the SPAs, it was utterly perplexing that the learned JC would still erroneously find that the case still required a full trial to further examine the proper interpretation of the terms of the SPA.

[58] This same exact finding had already been affirmed by the Court of Appeal in the case of *Tham Wai Keat & Ors v. Cosmopolitan Avenue Sdn Bhd & Anor* [2023] MLJU 1007, which also involved the very same project as in this appeal. The High Court there (also affirmed by the Court of Appeal *via* Appeal No. B-02(IM)(NCvC)-1384-07-2021) had similarly found that it had never been the parties' intention that the respective individual parcels can only be delivered VP upon the full completion of the entire project:

> [31] *Pursuant to clause 20.4, it is abundantly clear the issuance of Borang F1 in respect of the Parcels ie Perakuan Siap dan Pematuhan Sebahagian is in accordance with the terms and condition of the sale and purchase agreements.* It appears that the Plaintiffs claim that the 2nd Defendant has contravened prescribed law is misconstrued.
>
> [32] Consequentially the issuance of a partial completion *ie*, Borang F1 by the 2nd Defendant cannot be said to be in breach of the 2nd Defendant's duty to the Plaintiffs. It cannot also be said the issuance of the Borang F1 has induced the 1st Defendant to deliver vacant possession prematurely as issuance of Borang F1 in respect of the parcels is permissible under the bye-laws.
>
> [33] *Pursuant to clause 20.4 of the SPAs,* the Plaintiffs have contractually *agreed that even after the issuance of the CCC in respect of the Parcels (which entitled the Plaintiffs to occupy their Parcels), construction works of the other parts of the Project shall continue until completion.* The intention of the parties is clear – the Plaintiffs' occupation of the Parcels after the issuance of the CCC is to a certain extent parallel with the constructions carried out for the other components of the Project.
>
> [34] *As such it was never intended for the delivery of vacant possession of the Plaintiffs' Parcels to be conditional upon the issuance of the CCC in respect of the whole Project.* Had that been the intention of the parties, clear words to that

A effect would have been incorporated in the said provisions. This is especially so because the Plaintiffs' argument if accepted would be detrimental to the 1st Defendant as it would attract massive sum of LAD due to the Project being a large-scale development project to be completed in phases. (emphasis added)

B **[59]** The same sentiment was yet again echoed in *Quah Eng Hai & Anor v. Cosmopolitan Avenue Sdn Bhd & Ors* [2019] 8 MLJ 194, where the High Court (affirmed by the Court of Appeal *via* Appeal No. W-02(IM)(NCvC)-1193-06-2018) also dealt with a clause similar to cl. 20.4 of the SPA here, where the parties have already mutually anticipated that the purchasers' respective parcels can be completed ahead of other parts of the entire project (partial CCC). Here, the court had allowed an application for the purchasers' claim to be struck out:

C

[28] … It is the both the first and third defendants' case that the unit purchased by the plaintiffs has been completed. In this regard, it is my finding that the plaintiffs' definition of the 'property' which is to include both the unit purchased by the plaintiffs and the common area is nowhere to be found in the SPA. *Instead, under the SPA, the unit purchased by the plaintiffs is described as 'parcel' and that the parcel purchased is part of the project.*

D

[29] Having taken note of the first defendant's defence that the plaintiffs parcel was indeed completed when the notice of vacant possession dated 2 October 2015 was issued and that the part which has yet to be completed at the material time is the common property, *it is my finding that under cl 20.4 of the SPA, the plaintiffs had expressly acknowledged and agreed that by reason of the unit purchased forming part of the overall development of the project, construction and other works shall continue to be carried out on, at and other parts of the project even after the issuance of the certificate of completion and compliance to the plaintiffs' unit. In light thereof, I take the view that the plaintiffs' allegation that the property was not completed when the notice of vacant possession was issued is rather mischievous.* (emphasis added)

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F

[60] Another High Court decision (upon the very same project in this appeal), which shared the same sentiment was *Cosmopolitan Avenue Sdn Bhd v. Thien Kim Keong & Ors And Another Case* [2021] CLJU 664; [2021] 1 LNS 664; [2021] MLJU 720, *albeit* the High Court here referred to the partial CCC under the SPAs to be the CPC while the full CCC to be the CCC.

G

[32] Contrary to the contention of the Plaintiffs, *the issuance of the CCC is not a pre-requisite for delivery of vacant possession. Both CPC and CCC are distinct certificates for different purposes under the SPA.* This is made clear by clause 25.2 which expressly state that although possession is given, it does not to be equated with the right to occupy. The Plaintiffs can only occupy when the CCC is issued.

H

…

I

[34] *The terms of the SPA are clear and unambiguous. The relevant date for delivery of vacant possession is the date of giving notice of issuance of CPC.* The right to occupy and issuance of CCC is irrelevant to the date for delivery of vacant possession. As the notices were given before the due date for delivery of vacant possession, no issue of imposition of LAD arises.

[35] In view of this, *the claim is both frivolous and vexatious, and an abuse of the court's process. A trial is unnecessary, and the case can be disposed of summarily.*
(emphasis added)

[61] At this juncture, it is already obvious that the learned JC had erred in finding that there were triable issues necessitating a trial. Further negating the plaintiffs' claim beyond salvation was the fact that a large majority of the purchasers had already entered into full and final settlement agreements in which they were already paid LAD (upon which they agree to no longer have any claims against the developer under the SPAs).

[62] Considering the settlement agreements, the plaintiffs in truth had already put the matter of LAD to final rest and conclusion. It would only be gravely unjust to allow the plaintiffs to re-litigate the same exact matter that the plaintiffs have unequivocally laid to rest. We refer to a recent decision by SM Komathy Suppiah J (now JCA) in the case of *Chua Chong Poh & Ors v. Kingsley Hills Sdn Bhd & Anor* [2020] CLJU 1110; [2020] 1 LNS 1110; [2020] MLJU 1452 in which Her Ladyship had struck out a claim by 47 purchasers for LAD considering that the same purchasers had already entered into settlement agreements and were already paid LAD under the same settlements:

[27] It was the defendants' contention that the claim was legally and factually unsustainable as the plaintiffs are bound by the settlement agreements. It was strenuously argued that plaintiffs are estopped from maintaining this action and/or raising illegality as a means of undermining the settlement agreements to claim foradditional liquidated damages having affirmed the settlement agreements by accepting the payments made there under.

…

[29] In this case, I need only consider some brief and simple undisputed facts. The plaintiffs signed the settlement agreements with the defendants as there was delay in the delivery of vacant possession. They accepted the payments made to them due under the settlement agreements. They do not challenge the validity of the settlement agreements in this action. It is their case, that the provision in the settlement agreements that they shall have no further claims against the defendants does not preclude them from claiming for additional liquidated damages as the sale and purchase and construction agreements are tainted by illegality.

A [30] There are not many cases on this point. *The general rule is that where parties have entered into a settlement agreement, the agreement alone will govern the relationship between the parties and a dispute could not be reopened unless the defendant has taken unfair advantage of the plaintiff.* (emphasis added)

[63] The court in *Chin Kok Woo & Ors v. Sky Park Properties Sdn Bhd & Ors* B [2022] 4 CLJ 716; [2022] 10 MLJ 153 went as far as finding that a settlement agreement should necessarily prevail even as against a social legislation such as the Housing Development (Control and Licensing) Act 1966:

[75] I find that *the plaintiffs cannot reopen the issue of liquidated damages* again as they have either: (i) pursued the claims before the Housing Tribunals; C and *(ii) that they have settled their claims in full as seen in the settlement agreements* executed and shown in the affidavit in support filed by the first defendant.

[76] *I am aware that the Housing Development (Control and Licensing) Act is a piece of social legislation and is intended to protect purchasers. However, this does not mean that this court should disregard any settlement agreement that was entered* between the plaintiffs and the defendants that was entered into to finalise D any liquidated ascertained damages claimed by the said plaintiffs. Such agreements were not specifically prohibited bylegislation, and I therefore, find that the plaintiffs' claims are frivolous and vexatious against the first defendant.

[77] The sword of Justice cuts both ways. I am of the opinion that *this* E *court should not merely protect purchasers but should also prevent any attempt to reopen litigation that has been either litigated before a competent tribunal or settled amicably.* (emphasis added)

[64] The court in *Tham Wai Keat & Ors v. Cosmopolitan Avenue Sdn Bhd & Anor* [2023] MLJU 1007 even expanded on the same principle in finding F that a plea of *non est factum* (or that the purchasers were 'unaware' of the nature and consequence of the settlement agreement) cannot nullify the validity of the settlement agreements that the parties had unequivocally entered into:

G [36] It is the *Plaintiffs' contentions that when the 43 Plaintiffs accepted the LAD from the 1st Defendant, they were not aware that they had abandoned or waived their claims for any further LAD.* The 43 Plaintiffs are therefore not estopped from claiming further LAD. *It is this Court's considered view such contention is flawed for the following reasons.*

[37] Pursuant to the Settlement of Liquidated Damages For Late Delivery H of Vacant Possession Plaintiffs signed by the 43 Plaintiffs, *the said Plaintiffs have agreed that the sum of LAD they have agreed to accept shall be the full and final settlement of any sums and claims that the 43 Plaintiffs may have against the 1st Defendant* in respect of the late delivery of vacant possession of the Plaintiffs' Parcels.

I [38] In the absence of fraud, the *Plaintiffs are bound by the terms of the settlement agreement and cannot resile from their promise they made to the 1st Defendant ie, that the LAD accepted by the 1st Defendant constitute a full and final settlement of the 43 Plaintiffs' claim.* (emphasis added)

[65] Thus, even if we were wrong on the interpretation of the SPAs (as to the manner and method of VP delivery), it remains inevitable that the plaintiffs' claim should still be struck out as the plaintiffs should necessarily be estopped from raising the same issue of LAD, which they had mutually and unequivocally settled with the developer.

[66] Considering all the aforementioned deliberations and findings, we hereby answer the second issue in the negative. The learned JC was certainly wrong in finding that there were triable issues as to the interpretation of the SPAs and as to the propriety of the delivery of VP by the developer based on the partial CCC in Form F1.

Our Decision

[67] We are of the view that there were resounding merits in both Appeal 1594/developer's appeal and Appeal 1654/architect's appeal and hereby allow both of the appeals. The High Court's decision to dismiss both the developer's striking out application (encl. 12) and the architect's striking out application (encl. 14) is hereby set aside. We accordingly allow both encls. 12 and 14 and hereby strike out the entirety of the plaintiffs-respondents' claims against the both defendants-appellants.

[68] We also order costs of RM15,000 (here and below) for each of the appeals (RM30,000 total) to be jointly and severally paid by the respondents to the respective appellants subject to allocator.

[69] Lastly, we must state here that during the preparation of this grounds of judgment (GOJ), the learned chairperson of this panel, Kamaluddin bin Md Said JCA, has since retired. I have forwarded the draft of the GOJ to my learned brother, Collin Lawrence Sequerah JCA, who has expressed his agreement with the draft.